Supreme Court, U.S.
FILED
OCT 4 2002
OFFICE OF THE CLERK

No. 02-329

In the

Supreme Court of the United States

DAVID A. MONTS,

Petitioner,

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AGRICULTURAL AND MECHANICAL COLLEGE, d/b/a UNIVERSITY OF NEW ORLEANS, PATRICK M. GIBBS, FRANK H. SCHAMBACH, and GUSTAVE S. CANTRELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding before the Louisiana Fourth Circuit Court of Appeal were:

- David A. Monts, Petitioner;
- Board of Supervisors of Louisiana State University and Agricultural and Mechanical College d/b/a University of New Orleans, Respondent;
- Patrick M. Gibbs, Respondent;
- Frank H. Schambach, Respondent;
- Gustave S. Cantrell, Respondent;

In addition, the following filed an *amicus curiae* brief in the Louisiana Supreme Court:

- National Society of Professional Engineers; and
- Louisiana Engineering Society.

This Brief in Opposition is submitted on behalf of a state governmental entity and three individuals. Rule 29.6 of the Rules of the United States Supreme Court is therefore inapplicable.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Reasons for Denying the Writ 1

I. Introduction 1

II. The Facts Adduced in the District Court and Found by the Court of Appeal do not Support Petitioner's Contentions 3

III. Petitioner's Characterizations of the Opinion of the Fourth Circuit Court of Appeal Are Misleading 5

A. The Appeal Court Did Not Rule That the Internal Nature of Monts's Communication Rendered it Unprotectable *Per Se* 5

B. The Appeal Court Did Not Rule That Reports of Building Safety Code Violations are *Per Se* Unprotected Speech 6

IV. The Fourth Circuit Correctly Found Monts's Speech was Not a Matter of Public Concern..... 8

V. The Fourth Circuit Properly Affirmed The Trial Court's Granting of Summary Judgment..... 14

VI. Conclusion..... 21

TABLE OF AUTHORITIES

Page

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202
(1986) 17

Barns v. McDowell,
848 F.2d 725 (6th Cir. 1988) 14

Bell v. Touro Infirmary, Inc.,
785 So.2d 926 (La. App. 4 Cir. 2001) 20

Benningfield [v. City of Houston,
157 F.3d 369 (5th Cir. 1998)] 13

Brown v. Manhattan Life Ins. Co.,
791 So.2d 74 (La. 2001) 16, 17

Brown v. Texas A&M University,
804 F.2d 327 (5th Cir. 1986) 15

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265
(1986) 17

Chesser v. Sparks,
248 F.3d 1117 (11th Cir. 2001) 9

Conaway v. Smith,
853 F.2d 789 (10th Cir. 1988) 14

Connick v. Myers,
461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708
(1983) ..... *passim*

Coughlin v. Lee,
946 F.2d 1152 (5th Cir. 1991) 6, 17

Feldman v. Philadelphia Housing Authority,
43 F.3d 823 (3rd Cir. 1994) 15

Givhan v. Western Line Consol. School District,
439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)..... 6

Kokkins v. Ivkovich,
185 F.3d 840 (7th Cir. 1999) 8

Minneapolis, St. P. & S.S.M Ry. Co. v. Rock,
279 U.S. 410, 49 S.Ct. 363 (1929). 1

Mishk v. Destafano,
5 F.Supp.2d 194 (S.D.N.Y. 1998) 10

Mix v. University of New Orleans,
609 So.2d 958 (La. App. 4 Cir. 1992) 3, 9

Monts v. Bd. of Sup'rs of La. State Univ.,
812 So.2d 787 (La. App. 4 Cir. 2002) .....*passim*

Morris v. Crow,
142 F.3d 1379, 1382 (11th Cir. 1998)..... 10

Mount Healthy City School Dist. v. Doyle,
429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1997)
..... 2

Murray v. Gardner,
741 F.2d 434 (D.C. Cir. 1984). 14

Nero v. Hospital Authority of Wilkes County,
86 F.Supp.2d 1214 (S.D. Ga. 1998) 10

Pappas v. Guiliani,
290 F.3d 143 (2nd Cir. 2002)..... 8

Ross v. Moffitt,
417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341
(1974) 3, 16

Teague v. City of Flower Mound, Texas,
179 F.3d 377 (5th Cir. 1999) 6, 13

Terrell v. University of Texas System Police,
792 F.2d 1360 (5th Cir. 1986) 12

Thompson v. City of Starkville,
901 F.2d 456 (5th Cir. 1990) 15

Vincent v. City of Talladega,
980 F.Supp. 410 (N.D. Ala. 1997) 12

Waters v. Churchill,
511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686
(1994) 2, 9

OTHER AUTHORITIES

28 U.S.C. §1257(a) 1

Rule 12, Federal Rules of Civil Procedure 16

Rule 29.6, Federal Rules of Civil Procedure i

Rule 56, Federal Rules of Civil Procedure 16

La. Code Civ. P. art. 927 16

La. Code Civ. P. art. 966 16

La. Code Civ. P. art. 2747 20

REASONS FOR DENYING THE WRIT

I. Introduction.

The sole question presented by the Petition is whether a public employee's communications to his employer concerning building code violations constitute constitutionally protected free speech. *See* Petition ("Pet.") at i. Petitioner's answer to that question is, "always," while Respondents and the Court of Appeal respond, "sometimes." Respondents respectfully submit that the Court of Appeal is correct, and the Petition for Writ of Certiorari should be denied.[1]

Petitioner suggests that in affirming the district court's grant of summary judgment against him, the Louisiana Fourth Circuit Court of Appeal committed fundamental constitutional errors by ruling that a public employee's internal complaints about gross health and safety code violations, purportedly creating a virtual certainty of mass loss of life, cannot constitute constitutionally protected free speech. However, Petitioner utterly misperceives and misstates the Opinion of the Court of Appeal. Rather, in its Opinion the Louisiana Fourth Circuit merely (and properly) stated well-established and oft iterated principles and analyses crafted by this Honorable Court in considering First Amendment retaliation claims. Far from forever muting powerful crusaders for public safety, the Opinion merely stands for the proposition that not all complaints by

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[1] Petitioner nominally seeks issuance of a Writ to the Louisiana Supreme Court. However, that Court, in its discretion, unanimously declined to review the Fourth Circuit's Opinion and later denied rehearing; accordingly, the Writ would properly be directed to the Louisiana Fourth Circuit Court of Appeal. *See* 28 U.S.C. §1257(a); *e.g., Minneapolis, St. P. & S.S.M Ry. Co. v. Rock*, 279 U.S. 410, 412, 49 S.Ct. 363, 364 (1929).

a public employee necessarily constitute protected speech. The Opinion does not deviate from, and is wholly consistent with, precedents from this Court addressing First Amendment concerns in the public employment context. *See, e.g., Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1997). Indeed, it is Petitioner's position, that all public employee criticism is protected speech, that runs directly contrary to this Court's jurisprudence.

Ultimately, this case is a prime example of this Court's caution in *Connick*:

> To presume that all matters which transpire within a government office are public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a round table for employee complaints or internal office affairs.

Connick, 461 U.S. at 149. The Court of Appeals Opinion breaks no new ground and is not inconsistent in any way with the constitutional analyses crafted by this Court. In fact, perusal of Petitioner's Petition to this Court makes it clear that he complains not of the tests applied by the Louisiana Fourth Circuit Court of Appeal; rather that, in his mind, the outcome should have been different. Monts thinks that the matters he spoke about were important safety

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issues; Respondents disagree, and after extensive fact discovery Monts failed to put forth sufficient evidence to convince either the Trial Court or the Appeal Court that his characterization of the communications at issue was the correct one. Mere disagreement with the outcome of a lawsuit, even if the result rendered was incorrect (which Respondents deny in this case), is insufficient grounds for certiorari to issue. *E.g., Ross v. Moffitt*, 417 U.S. 600, 615-16, 94 S.Ct. 2437, 2446, 41 L.Ed.2d 341 (1974). Plainly, there is nothing in the Petition to warrant review by this Honorable Court, and Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

II. The Facts Adduced in the District Court and Found by the Court of Appeal do not Support Petitioner's Contention.

David Monts was an "at-will" employee of the University of New Orleans, meaning that he could be terminated at any time with or without cause. *E.g., Mix v. University of New Orleans,* 609 So.2d 958, 964 (La. App. 4 Cir. 1992). As the Trial Court explicitly recognized, he was discharged from his employment with the University effective August 15, 1996, because of his continued disruption of departmental meetings and his negative attitude with regard to his employment with the University, including, but not limited to, his copying and distributing the salaries of other employees. *See, e.g.*, Trial Court's Reasons for Judgment ("Reasons") at 2-4, Pet.App. at A-13-14-A-16. ("Plaintiff presented no evidence that his employment with the University was not at-will nor did he show that he was discharged for any reason other than his failure to timely complete his work assignments and his disruptive behavior within the Physical Plant Department."); *e.g., Monts v. Bd. of Sup'rs of La. State*

Univ., 812 So.2d 787, 790 (La. App. 4 Cir. 2002), Pet.App. at A-8.

Petitioner, however, maintains that his termination resulted from his complaining to his supervisors and the University's outside legal counsel about purported mal- or misfeaseance in the Physical Plant Department. There is absolutely no credible evidence to support this suggestion. *E.g.*, Reasons at 4, Pet.App. at A-16. Furthermore, beyond Monts's own self-serving commentary, there is nothing in the record to support Petitioner's claims of unauthorized practice of engineering endangering the safety of the public, nor that violations of building codes even existed, much less that violations were uncorrected.

Moreover, while there may be passing reference to them in some papers filed in this case, Petitioner *never* pursued his specious, if not libelous, claims of failure to comply with State hiring and bid laws. Petitioner did no discovery *whatsoever* directed to these allegations, and *did not even mention* the possibility of these purported violations of law during the depositions of the now accused individuals. In fact, Petitioner himself *admits* that he has no evidence for any such claims, yet he trundles them out in his Petition to this Court in a transparent attempt to attach exaggerated significance to his workplace complaints. *See* Pet. at 3-4 (noting that Monts has no evidence to support any claims of violation of State bid and hiring laws.).

Finally, each deponent who had anything to do with Monts's separation from the University *unequivocally* testified that the termination had nothing whatsoever to do with plaintiff's alleged "whistle-blowing." Ultimately, the District Court *twice* ruled that Monts has no credible evidence whatsoever to show that he was discharged for any reason other than his failure to timely complete his work assignments and his disruptive behavior within the Physical Plant Department. A panel of the Louisiana Fourth Circuit

Court of Appeal affirmed in an unanimous opinion, and the Louisiana Supreme Court denied Monts's Application for a Writ of Certiorari to that Court (and a subsequent request for rehearing) by a 7-0 vote. Respondents respectfully suggest that the lower courts were correct in their rulings and Petitioner's Petition to this Honorable Court should be denied.

III. Petitioner's Characterizations Of The Opinion Of The Fourth Circuit Court of Appeal Are Misleading.

Even a cursory review of the Opinion of the Fourth Circuit Court of Appeal in this case establishes that Monts's rantings in his Petition are not mere mischaracterizations of that Court's rulings, but are affirmatively misleading, obviously designed to completely reformulate the Fourth Circuit's Opinion in an attempt to fabricate some issue for this Court's review.

A. The Appellate Court Did Not Rule That the Internal Nature of Monts's Communication Rendered it Unprotectable *Per Se.*

For example, in suggesting that the Fourth Circuit's Opinion warrants further review, Monts cites as a consideration that the Opinion purportedly conflicts with jurisprudence from this Honorable Court. Pet. at 11. Specifically, Monts suggests that the Fourth Circuit's finding that, "Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech" somehow translates to a ruling that, by their very nature, internal complaints are not matters of public concern and, therefore, cannot be protected speech. *See, id.* While that formulation indeed contravenes the teachings of *Givhan v. Western Line Consol. School District,* 439 U.S. 410, 99

S.Ct. 693, 58 L.Ed.2d 619 (1979), the Fourth Circuit Opinion sets forth no such *per se* rule. In its Opinion the Fourth Circuit *nowhere even suggests* that the private or "internal" nature of the speech *per se* precludes First Amendment protection. Rather, the Court merely recognized that the nature of the speech is a factor to be considered in evaluating whether the communication at issue is in fact protected speech. *Monts,* 812 So.2d at 790-91, Pet.App. at A-7-A-9. It is, of course, well established that the public or private nature of the subject speech is an element to be addressed in the First Amendment retaliation context. *E.g., Teague v. City of Flower Mound, Texas,* 179 F.3d 377, 383 (5th Cir. 1999).

In fact, in its analysis the Fourth Circuit borrowed verbatim from the United States Fifth Circuit in describing the elements of a First Amendment retaliation claim. *Monts*, 812 So.2d at 790, Pet.App. at A-6-A-7. In quoting *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991)(which itself relied in large part on United States Supreme Court jurisprudence), the Court explained all the elements of a First Amendment retaliation claim, including the Fifth Circuit's recognition that to be protected the speech at issue must address matters of public concern, which "must be determined by the content, form, and context of the given statement, as revealed by the whole record." *Id., quoting, Coughlin,* 946 F.2d at 1156 (omitting citations). Thereafter, the Court of Appeal discussed the four areas of alleged protected speech identified by Monts and found, correctly: "The four instances of allegedly 'protected' speech that Monts cites signify his dissatisfaction in his workplace, and are not matters sufficiently infused with public interest to support his first amendment retaliation claim." *Monts,* 812 So.2d at 791, Pet.App. at A-8. Only after its analysis of content does the Court proceed under the *Coughlin* analysis to discuss the "context and form" of

Monts's expression, and then finding only that the internal nature of the speech "militate(s) against" a finding of protected speech. *Id.* It is disingenuous at best to suggest, as Monts does, that the Court considered only the form and context of the allegedly protected speech and established a *per se* rule that internal complaints cannot be protected.

B. The Appellate Court Did Not Rule That Reports of Building and Safety Code Violations are *Per Se* Unprotected Speech.

In his Petition, Monts incorrectly suggests that the Fourth Circuit concluded, also as a *per se* rule, that reports of information involving fire and safety code violations, the unauthorized practice of engineering and other allegedly unlawful acts, "are not matters sufficiently infused with public interest to support [a] First Amendment retaliation claim." Pet. at 11.

The Court of Appeal made no such finding. The Court actually held:

> In the instant case, review of the alleged code violations with which Monts was concerned—if they were code violations at all—cannot be said to be major matters of public safety. Monts complained of wire size, plumbing and leveling issues and the like. It would not appear that, even if they were present, these seemingly minor deviations from the purest building practices suggest a great threat to public health and safety. The four instances of allegedly "protected speech" that Monts cites signifies his dissatisfaction in his workplace and are not matters sufficiently infused with public

> interest to support his first amendment retaliation claim.

812 So.2d at 791; Pet.App. at A-8. It is simply wrong to suggest, and totally misleading to imply, that the Fourth Circuit ruled that *all* violations of safety or building codes are not matters of public concern. Plainly, the Court merely held that Monts's complaints did not concern matters which genuinely posed an apparent threat to public safety and welfare. It is obvious that not all minor deviations from technical code requirements will pose public safety issues. Notably, even if Monts's comments actually did address matters of public concern, it is well established that:

> [S]peaking up on a topic that may be deemed one of public importance does not automatically mean that the employee's statements address a matter of public concern as that term is employed *Connick [v. Myers*, 461 U.S. 138 (1983).]

Kokkins v. Ivkovich, 185 F.3d 840, 844 (7th Cir. 1999); *see, e.g., Pappas v. Guiliani*, 290 F.3d 143, 152 (2nd Cir. 2002)(concurring opinion)(collecting cases).

Accordingly, Monts's Petition rests largely on two rulings **the appellate court did not make**. The Court did **not** find that the internal or private nature of the speech precludes First Amendment protection, and the Court did **not** rule that violations of safety codes are not matters of public concern. Monts's attempts to mislead this Court should be rejected out of hand, as should his Petition for a Writ of Certiorari.

IV. The Fourth Circuit Correctly Found Monts's Speech Was Not A Matter Of Public Concern.

Monts's frenetic diatribe, despite its length and hyperbole, utterly ignores basic factual and legal elements of this case. For example, not once does Monts

acknowledge that he was an at-will employee who could be discharged at any time, with or without cause. *E.g.*, *Waters*, 511 U.S. at 679; *Mix*, 609 So.2d at 965. Monts also ignores that *there is no actual evidence of code violations in the record.* Specifically, the other members of the Physical Plant Services Department (including an architect and engineers), testified *unequivocally* that they knew of no violations of safety or building codes and that, if they had knowledge of them, any violations would have been corrected.

Importantly too, Monts does not recognize that it is simply not the case that violations of each and every building code provision, or, in the words of the Fourth Circuit, "minor deviations from . . . purest building practices," are matters of sufficient public interest to implicate First Amendment protection, and pointing out such "minor deviations" from code provisions is simply not protected speech. An employee does not have a constitutional right to inform superiors of the requirements of law. *E.g.*, *Chesser v. Sparks*, 248 F.3d 1117, 1123-24 (11th Cir. 2001).

Respondents do not dispute that serious matters of public health and safety are, indeed, matters of public concern, and there is nothing in the Fourth Circuit's Opinion which suggests to the contrary. As noted by the Court, however:

> [R]eview of the alleged code violations with which Monts was concerned—if they were code violations at all—cannot be said to be major matters of public safety. Monts complained of wire size, plumbing and leveling issues and the like. It would not appear that, even if they were present, these seemingly minor deviations from purest

> building practices suggest great threat to the public health and safety.

812 So.2d at 791, Pet.App. at A-8.

Additionally, as Monts himself stresses, reporting what he may have perceived as code violations was part of his job. *See* Pet. at 22. As such, Monts's comments about these building codes are definitionally not protected speech. As the court recognized in *Nero v. Hospital Authority of Wilkes County*, 86 F.Supp.2d 1214 (S.D. Ga. 1998): "When an employee communicates matters in the 'normal course of his duties' those matters are communicated as an employee and are not protected speech." 86 F.Supp.2d at 1225, *aff'd w/o op.*, 202 F.3d 288 (11th Cir. 1999), *quoting, Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998); *see, e.g., Mishk v. Destafano*, 5 F.Supp.2d 194, 201 (S.D.N.Y. 1998).

In any event, it is plain, as the Appeal Court found, that Monts's complaints and criticism were primarily focused on conditions of his employment. This is apparent from, *inter alia*, the instances of allegedly "protected speech" cited by Monts himself and discussed by the Court in its Opinion. As the Court held, all of these instances "signify Monts's dissatisfaction in his workplace, and are not matters sufficiently infused with the public interest to support his First Amendment retaliation claim." *Monts,* 812 So.2d at 791, Pet.App. at A-8.

For example: he complained of (1) having his conclusions and ideas "overrule[d] or ignore[d]"—essentially a complaint that he did not get along with supervisors; (2) he photocopied and disseminated information concerning his co-workers salaries and bonuses—clearly a complaint about low salaries, an aspect of his employment and not a matter of public concern; (3) he complained that Respondent Cantrell advanced certain

University projects before others because those projects were of "special interest" to senior University officials;[2] (4) other complaints about "abusive and harassing conduct"—surely complaints about his work conditions and not matters of interest to the general public; and, (5) he reported to UNO's attorneys with concerns about code violations—which is an irrelevancy in this context because there is no showing that any of the defendants knew anything about these consultations prior to Mr. Monts's termination.[3] These matters concern nothing more than the policies, practices and procedures of the Physical Plant Department. Analogously, one court has held:

> While it is undoubtedly true that the general public has an interest in having quality fire protection, it is also true that a general public has an interest, at least theoretically, in good government in all of its aspects, and an internal controversy over firefighting policy and procedures within a fire department cannot be protected speech any more than a surly, insubordinate remark by a police chief to a mayor can receive First Amendment protection.

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[2] Notably, there is no suggestion that any of these supposed "projects of special interest" were for the personal benefit of senior University officials—rather the most that can be inferred is that certain campus building projects were given a different priority than that which Mr. Monts would have ascribed to them.

[3] *See* Reasons at p. 5, Pet.App. at A-18. ("[T]here was no evidence whatsoever that the University attorneys reported Monts's visits to anyone at the University who had the authority to hire and fire an employee. . .").

Vincent v. City of Talladega, 980 F.Supp. 410, 412 (N.D. Ala. 1997). Borrowing from the United States Fifth Circuit:

> The conclusion is inescapable: [Monts] was not terminated for speaking "as a citizen upon matters of public concern." *Connick*, 103 S.Ct. at 1690, or for "speak(ing) out as a citizen on a matter of general concern, *not tied to a personal employment dispute*," *id.* at 1691 n.8 (emphasis added).

Terrell v. University of Texas System Police, 792 F.2d 1360, 1363 (5th Cir. 1986).

Additionally, as recognized by the Fourth Circuit as *part* of its analysis, the context and form of Monts's expression supported the finding that he was not addressing matters of public concern as a citizen, but was acting as a disgruntled employee. With the exception of the discounted communication with counsel, all of Monts's complaints, either verbal or in memoranda, were internal to the Physical Plant Services Department. He did not complain to other University officials and he did not report his suggestions of wrongdoing to the State Board of Ethics which, as is explained in the Staff Handbook, he had the full right to do.[4] As the Fourth Circuit held only after considering the content, form and context of Monts's statements: "Accordingly, it is apparent that Monts's internal complaints were not primarily matters of public concern, and thus, not protected speech." *Monts,* 812 So.2d at 791, Pet.App. at A-8. This finding is fully consistent with those

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[4] Monts did file complaints with the State Board of Ethics long after this lawsuit was filed. His complaints were summarily dismissed.

cases where the public or private nature of the speech is at issue. For example, in *Teague v. City of Flower Mound, Texas*, 179 F.3d 377 (5th Cir. 1999), the court observed:

> In terms of context, however, [plaintiff's] grievance is more appropriately characterized as private: It was made in the setting of a private employee-employer dispute. Although "[t]he fact that the Plaintiffs chose to file internal grievances rather than publicizing their complaints is not dispositive," *Benningfield [v. City of Houston,* 157 F.3d 369, 375 (5th Cir. 1998)], this evidence does most certainly suggest that the speech was private in context, rather than public.

179 F.3d at p. 383 (footnote omitted).

As the United States Court of Appeals for the Sixth Circuit noted in considering retaliation claims in a context similar to the one at Bar:

> While [plaintiff] may have been justified in his beliefs that his action of the Business Enterprises Program did not receive enough of the operating budget, that the Program should have had a 24-hour repair deadline before he instituted one and that the wisdom and propriety of some of the Program's purchasing practices was questionable, he presented no evidence linking of these charges to corruption in the Bureau or in the Program. Consequently, instead of having addressed a matter of public concern, [plaintiff's] complaints appeared to be

> nothing more than examples "of the quintessential employee beef: management has acted incompetently." *Murray [v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984).]

Barns v. McDowell, 848 F.2d 725, 734-35 (6th Cir. 1988). Similarly, Monts complained about the University's, specifically the Physical Plant Services Department's, allocation of financial and personnel resources and disagreed with co-workers about how certain projects should be accomplished. Notwithstanding what he may genuinely, if erroneously, believe as raising real issues of public welfare and concern, the trial court twice and the appellate court unanimously, on the record before them, essentially found that at best Monts's complaints amounted to no more than "the quintessential employee beef."

Examination of the cases Monts cites in support of his "public concern" argument merely highlight that his complaints did not rise to the level warranting First Amendment protection. For instance, Monts cites to the case of *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988). Pet. at 20. In *Conaway,* the plaintiff reported "several electrical violations which were dangerously exposed to the public." 853 F.2d at 791. In addition, however, he had accused his superiors of requesting him to "perform on city time for city officials and their friends and relatives, often without the required permits and license." 853 F.2d at 795. He also complained of being pressured to work on political campaigns, which has clearly been recognized as a matter of public concern. *Id.* at n. 6 (*citing, Connick v. Myers*, 461 U.S. 138, 149 (1983)). In addition, the *Conaway* plaintiff reported activities which might have indicated illegal payoffs or kickbacks, and he refused to issue favorable building inspection reports in exchange for money. *Id.* at n.

7. In contrast, Monts's insignificant disagreements with the internal operations of the Physical Plant Department did not approach the level of importance or concern recognized as protected speech in *Conaway*.

Other cases relied upon by Monts are likewise inapposite. For example, in *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3rd Cir. 1994), the plaintiff had been retaliated against for, among other things, reporting on investigations of an illegal bid-rigging scheme and the improper promotion of fellow employees implicated in that violation of law. *See* 43 F.3d at 827. In *Thompson v. City of Starkville*, 901 F.2d 456 (5th Cir. 1990), the plaintiff-police officer was allegedly discharged for reporting adultery by other police officers taking place while the officers were on duty and that police officers were committing burglaries, as well as unjust promotions within the department. *See* 901 F.2d at 457-58. In *Brown v. Texas A&M University*, 804 F.2d 327 (5th Cir. 1986), plaintiff had been retaliated against for exposing self-dealing by a university official—a clear case of misconduct and betrayal of public trust.

As the foregoing sampling of cases cited to by Monts shows, in each case the complained of conduct was sufficiently unethical or illegal to allow protestations concerning that conduct to rise to the level of protected activity. In this case, Monts's complaints involved nothing more than disagreements, if strong ones, with his co-workers and supervisors about how to properly complete University building and maintenance projects. Nothing alleged by Monts in this case comes close to the undeniably serious, unethical or illegal practices present in the cases he relies upon.

V. The Fourth Circuit Properly Affirmed The Trial Court's Granting Of Summary Judgment.

In addition, it is grossly misleading to ignore, as Petitioner attempts to do, that this case was decided by summary judgment and not, for example, pursuant to La. Code Civ. P. art. 927, the Louisiana procedural equivalent of a motion to dismiss under Rule 12, Fed. R. Civ. P. Petitioner was provided with ample opportunity to make out his case that his complaints touched on matters of genuine public concern, and as a matter of fact and law, he failed. The District Court twice considered the evidence before it, and twice rejected Petitioner's contentions – on the record before it the Louisiana Fourth Circuit Court of Appeal saw nothing to disturb in the District Court's rulings, and the Louisiana Supreme Court unanimously declined to accept the case for review. That Petitioner disagrees, no matter how sincerely, with those findings does not alter the record considered below, nor does it qualify this case for further appellate consideration. *E.g., Ross,* 417 U.S. at 615-16.

Much like Rule 56, Fed. R. Civ. P., pursuant to Article 966 of the Louisiana Code of Civil Procedure in moving for summary judgment a movant first must "point out to the court that there is an absence of factual support for one or more elements essential to plaintiff's claim." *Brown v. Manhattan Life Ins. Co.*, 791 So.2d 74, 77 (La. 2001). Then, the burden shifts to the plaintiff to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. 791 So.2d at 78. Finally, "a fact is material for purposes of summary judgment if its existence or non-existence is essential to the plaintiff's cause of action under the applicable theory of recovery." *Id.* Respondents respectfully submit that they made a sufficient showing in the courts below of the utter lack of factual support for all elements essential to plaintiff's First Amendment claims, including the requirement that the

speech at issue address matters of genuine public concern rather then complaints and criticisms by the employee *qua* employee.

In his Petition, Monts yet again argues the facts, disagreeing with the Courts. *See, e.g.,* Pet. at 13-14. This ignores that whether the speech was a matter of public concern, and therefore entitled to First Amendment protection in the first place, is a question of law for the court. *Connick,* 461 U.S. at 148 n.7; *Coughlin*, 946 F.2d at 1152. Moreover, Monts continually fails to recognize that as a matter of fact both Courts considering the case found there was no credible evidence adduced below in support of his claims. A motion for summary judgment is properly granted when a party fails to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. *See, e.g., Brown,* 791 So.2d at 78; *see, generally, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).[5]

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[5] In this regard, Monts's statement that "no trier of fact has yet decided the issue of motive or the ancillary issue of pretext" is simply wrong. *See* Pet. at 16. In point of fact, the District Court clearly found:

> In this case the substantially motivating factor in plaintiff's discharge was his disruptive behavior, negative attitude and devise actions in disseminating information concerning the salaries of co-employees and his superiors. The Court found that although the First Amendment may have protected plaintiff's speech, his actions clearly justified his termination.

Pet.App. at A-20.

Petitioner put forth nothing but hearsay, innuendo and supposition to support his case. There is nothing left to defend against motion for summary judgment when fact is met with mere chimera. In this respect, Petitioner's listing of purported "facts" which support his claims (Pet. at 4-5), is pointless, as it has been established that he offered insufficient proof to support a finding that these listed statements were actual facts and that, even if they were, their existence would have been sufficient to avoid summary judgment.

With no real evidence to support his claims, in the courts below, and again in this forum, Monts relies upon self-serving, irrelevant and inadmissible affidavits, three of which, those of Monts himself, a Mr. Anderson and a Mr. Ehlers, are included in the Appendix to the Petition. Pet. at 4; Pet.App. at A-84-A-93. These affidavits, however, are purely self-serving, are not based upon personal knowledge and/or contain the rankest sort of hearsay. They do not, therefore, have any evidentiary value.

Messrs. Ehlers and Anderson, ex-UNO employees, were one-time co-workers with Mr. Monts. Their affidavits, however, are worthless. For one thing, they are replete with inadmissible hearsay. For example, Ehlers states at ¶ 27 of his affidavit:

> . . .Once Ms. Carbonette said to me, 'I put your work order at the bottom.' My understanding was that Ms. Carbonette did this and said this because she was angry at Mr. Parnon and therefore wished the untimely completion of work orders submitted by Mr. Parnon's staff to reflect poorly on Mr. Parnon and his staff. . .

Pet.App. at A-88.

Even if this were relevant, Mr. Ehlers is simply not competent to testify as to what Ms. Carbonette may have said, nor does his opinion as to why Ms. Carbonette said something or what she wished for have any evidentiary value whatsoever. Later, the affidavit states:

> . . .Mr. Monts then told this to Mr. Parnon at a departmental meeting with me and other staff members present, and although Mr. Parnon did not appear happy about it, he okayed Mr. Monts's decision. Afterwards Mr. Parnon told me, 'I wish I had the balls to do that.' Later on, I overheard Mr. Schambach angrily telling someone on the telephone, 'Dave went to see an attorney!'

Ehlers Aff. at ¶ 31 (Pet.App. at A-88-A-89). Clearly, (and again, even if it were relevant) testimony by Mr. Ehlers about what others may have said, including what he may or may not have overheard from one end of a telephone conversation, cannot be considered credible evidence.

Additionally, the affidavits contain mere statements of personal opinion which are wholly irrelevant to any issues at bar, and specifically do not supply any proof that Mr. Monts was terminated in retaliation for exercising his First Amendment rights. For instance, in his affidavit Ehlers states:

> In or about November 1994, I wore a vest to work one day. At that time, Mr. Cantrell told me we had to go out into the parking lot. Once in the parking lot, Mr. Cantrell said, 'I have a problem with you. You're wearing a vest. I fired a guy for wearing a vest.' *At that point, I became convinced that*

> *Mr. Cantrell was severely mentally unbalanced.*

Ehlers Aff. at ¶ 28 (emphasis added) (Pet.App. at A-88). Needless to say, this statement is not only insulting, but also wholly inadmissible and completely irrelevant.

Finally, lest there remain a scintilla of concern that something in these expressions of personal feelings suggested the existence of an issue of fact—which Respondents vehemently deny—it should be noted that even accepting the expressions in the affidavits as true does not help Monts in the slightest. Simply, there is no disagreement that Monts was an at-will employee, subject to discharge with or without cause. *See* La. Civ. Code art. 2747.

> An "at will" employee is free to quit at any time without liability to his or her employer and may be terminated at any time provided the termination does not violate any statutory or constitutional provision . . . Beyond that, the reasons for termination need not be accurate, fair or reasonable . . . In fact, there need be no reason at all for termination.

Bell v. Touro Infirmary, Inc., 785 So.2d 926, 928 (La. App. 4 Cir. 2001). As the courts below recognized, Monts made no showing of any statutory or constitutional transgressions; accordingly, he was subject to dismissal at any time, for any reason. The submitted affidavits, therefore, are mere irrelevancies.

It is apparent that Mr. Monts is passionate in his belief that there was some nefarious motivation behind his

discharge. However, no amount of fervor can turn innuendo into fact or hearsay into proof.

Similarly, Petitioner's wholesale mischaracterizations of the Fourth Circuit's Opinion should not mislead this Honorable Court into thinking that the Court of Appeal stumbled into committing constitutional error. Contrary to the statements in Monts's Petition, the Court did not rule that internal communications cannot be subject to First Amendment protection, nor did that Court rule that violations of safety or building codes are *per se* not matters of public interest. The Court held only that Monts's complaints did not, in fact, implicate serious health and safety issues and were not, therefore, matters of public concern. Monts's strident protestations to the contrary have properly been overruled and no extent of misdescription of the Fourth Circuit's Opinion can support further appellate review of this case.

Mr. Monts was an "at will" employee of the University, subject to dismissal at any time consistent with the school's policies as delineated in the Staff Handbook. He became thoroughly disenchanted with his job and, as all the credible evidence proved, became a disruptive and divisive element impeding the efficient functioning of the Physical Plant Services Department. Therefore, he was terminated in accordance with University procedures. After some four years of discovery, the most that Petitioner is able to offer in support of his contention that he was terminated for exercising his First Amendment right of free speech are his own beliefs and suspicions supported only most tenuously by coincidence and inadmissible and irrelevant hearsay. The district court recognized that Petitioner would not be able to establish the central elements of his claim, and *twice* granted Respondents summary judgment. A panel of the Louisiana Fourth Circuit Court of Appeal agreed, and the Louisiana Supreme Court denied

Petitioner's Application for a Writ of Certiorari and his request for rehearing, both by a vote of 7-0. The rulings and opinions of the courts below are correct, are fully supported by the record and should not be disturbed.

Monts's Petition to this Court reflects only his illimitable capacity for self-delusion and concomitant hubristic self view. Shorn of its hysterical ravings and invocations of the spectre of constitutional doom, Mr. Monts's Petition suggests nothing whatsoever that warrants further appellate review. Ultimately, he disagrees not with the analyses of the Courts below, but only with their ultimate findings.

VI. Conclusion.

For the foregoing reasons, Respondents, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, d/b/a University of New Orleans, Patrick M. Gibbs, Frank A. Schambach and Gustave S. Cantrell, respectfully submit that Petitioner David A. Monts's Petition for a Writ of Certiorari should be denied.

Respectfully submitted:

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